U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] **Public Copy**

File: EAC 99 207 51102 Office: VERMONT SERVICE CENTER Date: MAY 21 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L Rosenberg

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that is engaged in the sale of cut flowers and foliage. It seeks to employ the beneficiary as its office manager and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition because the petitioner failed to establish the existence of a qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel submits a brief. The petitioner submits affidavits from individuals regarding the beneficiary's role with the business operations of the U.S. and foreign entities.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The petitioner claims the existence of a qualifying relationship between it and Sutton Farms, located in Trinidad and Tobago. Counsel argues on appeal that the relationship between the two entities is one of affiliates, as the beneficiary is the "owner-controller" of both entities. Counsel relies upon Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982), to advance his argument on appeal.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

> *Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; * * *

The petitioner makes the following claim regarding the ownership of the U.S. and foreign entities:

U.S. Entity:

[redacted] [beneficiary] 33.3% ownership
33.3% ownership
33.3% ownership

Foreign Entity:

[redacted] [beneficiary] 50% ownership
50% ownership

The first definition of affiliate noted above is "one of two subsidiaries both of which are owned and controlled by the same parent or individual." Control may be *de jure* by reasons of ownership of 51% of outstanding stocks of the other entity, or it may be *de facto* by reason of control of voting shares through partial ownership and by possession of proxy votes. Matter of Hughes, supra.

The crux of counsel's argument on appeal is that even though the beneficiary does not own a majority of the outstanding shares in the U.S. entity or in the foreign entity, he, nevertheless, controls each entity. Accordingly, counsel claims that the beneficiary owns and controls both entities and, therefore, satisfies the first definition of affiliate. In support of counsel's argument, the petitioner submits affidavits from its corporate counsel, the foreign entity's accountant, a banking officer, the beneficiary's spouse, the U.S. entity's attorney, and the U.S. entity's accountant. Each of these individuals claims that the beneficiary has complete control over each entity's business operations, as the beneficiary's business partners in each corporate venture are "silent."

Counsel has not presented a compelling argument on appeal. Although counsel is correct in relying on Matter of Hughes, supra in this particular case, his definition of what constitutes evidence of control is disputed by this office.

Counsel sets forth an argument that the beneficiary controls both the U.S. and foreign entities because he has complete discretion

and control over each entity's overall management and business operations. It is the position of the Service, however, that the holding in Matter of Hughes, supra requires a petitioner to show that an individual or parent has control over the entity " by reason of control of voting shares through partial ownership and by possession of proxy votes." This type of control, which is *de facto* control, can only be established through the submission of documentary evidence, such as agreements over the voting of shares, contracts entered into over the voting of shares, or agreements regarding proxy votes. Mere statements by shareholders and attorneys that the beneficiary manages each entity's operations will not suffice, as assuming control over a company's operations and management is not the same as assuming control over an entity's voting of shares. Accordingly, the Service concludes that the petitioner has failed to establish that one individual (beneficiary) or parent both owns and controls the U.S. and foreign entities.

The second definition of affiliate noted above is "one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." Upon review of each entity's ownership, it is clear that the same group of individuals does not own and control the U.S. and foreign entities.

For example, the petitioner is owned by 3 individuals, while the foreign entity is owned by 2 individuals. Only one individual, the beneficiary, owns a percentage of shares in each entity. Accordingly, the petitioner has failed to show that the same group of individuals own and control both entities in approximately the same share or proportion of each entity.

The evidence in the record clearly reflects that the petitioner and the foreign entity are not affiliates. Therefore, the decision of the director will not be disturbed.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.